93-748

No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1993

NIKOLAI A. ZARICK,

*Petitioner,*

vs.

THE STATE OF CONNECTICUT,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether the petitioner's Fourth Amendment right to be secure against unreasonable searches and seizures was violated when the trial court refused to require the testimony of two judges who had cooperated in producing a search warrant directed at the petitioner, despite an offer of proof by the petitioner that the judges had abandoned their role as neutral and detached magistrates?

Whether a photographic laboratory that develops film as an agent of private photographers is engaged in state action when it turns over photographs it deems to be of a suspicious character to local police authorities pursuant to a long-standing policy of cooperating with the police to which both the laboratory and police authorities have agreed?

Whether the petitioner's rights under both the First and Fourth Amendments were violated when a warrant was issued based upon nothing more than the petitioner's possession of photographs protected under the First Amendment?

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**On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut**

## PETITION FOR A WRIT OF CERTIORARI

Nikolai Zarick, petitioner, requests that this court issue a writ of certiorari to review the judgment of the Connecticut Supreme Court entered August 17, 1993, refusing to grant relief for violations of the petitioner's rights under the First and Fourth Amendments to the United States Constitution. The Connecticut Supreme Court denied the petitioner's request for a rehearing on September 15, 1993.

## OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 227 Conn. 207 (1993). It is reproduced in this petition at Appendix A.

## JURISDICTION

The jurisdiction of this court to decide federal questions is invoked pursuant to Title 28 United States Code § 1257 (a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourth Amendment to the United States Constitution reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution reads, in pertinent part, as follows: "[N]or

shall any state deprive any person of life, liberty, or property, without due process of law; . . . "

## STATEMENT OF THE CASE

This case involves the arrest of the petitioner on a variety of state criminal charges arising from the seizure of certain photographs alleged to depict minors in a variety of allegedly suspicious poses. In no case were any of the photographs pornographic within the implicit meaning of *Knox v. United States*, No. 92-1183. The petitioner entered conditional pleas of nolo contendere, reserving the right to appeal the trial court's rejection of his efforts to suppress evidence, as permitted by Connecticut law.[1] In particular, the defendant was charged with

[1] Connecticut General Statutes § 54-94a provides:
"When defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress evidence based on an unreasonable search or seizure, motion to suppress statements and evidence based on the involuntariness of a statement or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

employing a minor in an obscene performance,[2] one count of sexual assault in the first degree,[3] four counts of

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[2] This in violation of Connecticut General Statutes § 53a-196a which provides, in pertinent part, as follows:

"(a) A person is guilty of employing a minor in an obscene performance when (1) he employs any minor, whether or not such minor receives any consideration, for the purpose of promoting any material or performance which is obscene as to minors, notwithstanding that such material or performance is intended for an adult audience, or (2) he permits any such minor to be employed, whether or not such minor receives any consideration, in the promotion of any material or performance which is obscene as to minors, notwithstanding that such material or performance is intended for an adult audience, and he is the parent or guardian of such minor or otherwise responsible for the general supervision of such minor's welfare."

[3] Connecticut General Statutes § 53a-70 provides, in pertinent part, as follows:

"(a) A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person, or (2) engages in sexual intercourse with a person under thirteen years of age, or (3) commits sexual assault in the second degree as provided in section 53a-71 and in the commission of such offense is aided by two or more other persons actually present."

being an accessory to risk of injury to a child,[4] eight counts of sexual assault in the second degree,[5] three counts of risk of injury to a child,[6] one count of sexual assault in the fourth degree,[7] twelve counts of being an

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[4] Connecticut General Statutes § 53a-8 provides, in pertinent part, as follows:

> "(a) A Person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

Connecticut General Statutes § 53-21 reads, in pertinent part, as follows:

> "Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both."

[5] Connecticut General Statutes § 53a-71 provides, in pertinent part, as follows:

> "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such person is (1) under sixteen years of age. . . . "

[6] Connecticut General Statutes § 53-21. See note 4.

[7] Connecticut General Statutes § 53a-73a provides, in pertinent part, as follows:

> "(a) A person is guilty of sexual assault in the fourth degree when (1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age. . . . "

accessory to sexual assault in the second degree,[8] and, two counts of conspiracy to commit risk of injury to a child.[9] Petitioner was sentenced to 28 years imprisonment. *State v. Zarick*, 227 Conn. 207, 209-211 (1993).

The arrest warrant for the defendant was obtained as a result of a series of events set into motion by his wife's decision to send certain photographs to be developed at Guardian Photo (Guardian), a commercial photographic developing laboratory in Auburn, Massachusetts. Mrs. Zarick sent the undeveloped film to Guardian on or about August 19, 1987. On August 21, 1987, Guardian brought the photographs to the attention of the Auburn, Massachusetts police department. The Auburn police department in turn contacted the police department in Plymouth, Connecticut, which was the jurisdiction covering the return address on the envelope. The officers in Plymouth viewed the 194 photographs, determining them to be objectionable, and began to prepare a warrant.

The police sought the assistance of Superior Court Judge Charles Gill in preparing the search warrant. Judge Gill does not sit in the judicial district in which the

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[8] Connecticut General Statutes §§ 53a-8 and 53a-71. See notes 4 and 5.

[9] Connecticut General Statutes § 53-21. See note 4.

Connecticut General Statutes §§ 53a-48 provides, in pertinent part, as follows:

> "(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the conduct of such performance of such conduct, and any one of them commits an overt act in furtherance of such conspiracy."

warrant was to be executed. The judge is well-known nationally and in Connecticut as a proponent of a children's rights amendment to the United States Constitution and operates a nonprofit corporation called the National Task Force for Children's Constitutional Rights. Judge Gill instructed the officers on how to complete a search warrant for the premises of an individual suspected of sexually abusing children, even going to so far as to provide the officers with an FBI manual and an investigative manual from the Center for Missing and Exploited Children. The judge then instructed the officers to bring the warrant to another judge for signing. *Zarick*, 227 Conn. at 213.

The police officers then contact Judge Anne Dranginis, who presides in the same judicial district as Gill. Like Judge Gill, Judge Dranginis had no geographic nexus to this case. Unlike Judge Gill, she is not recognized as an expert on children's rights in general or the sexual abuse of children in particular. In addition to the warrant application, the officers brought with them the 194 photographs given to them by the Auburn, Massachusetts police department. The record does not indicate whether Judge Dranginis viewed these pictures before or after authorizing the warrant.

The warrant was subsequently executed on August 23, 1987. Evidence seized under it served as the basis for the charges filed against the defendant.

At both the suppression hearing and on appeal to the state's Supreme Court, the defendant sought an order to permit him to examine both Judge Gill and Judge Dranginis to support his claim that the warrant was issued by

magistrates who had abandoned their neutral and detached roles. Both tribunals rejected that request. In denying a remand, the Supreme Court noted: "There is no evidence in the record to indicate that such a discussion [between the judges regarding the warrant] took place." In a footnote, the court caustically observes: "Indeed, given the speed with which the officers prepared the warrant application on Saturday, August 22, 1987, and then located Judge Dranginis during the evening of the same day at a public restaurant for the purpose of review and issuance of the warrant, it is unlikely that Judge Dranginis and Judge Gill would have had the opportunity for any of the contact upon which the defendant speculates." *Zarick*, 227 Conn. at 214-15, n.7.

The defendant also sought at both the suppression hearing and on appeal to suppress the 194 photographs delivered by Guardian to the Auburn police department. Both tribunals rejected that claim. See Appendix B-1; *Zarick*, 227 Conn. at 227-28.

In addition, the defendant sought at both the suppression hearing and on appeal to establish that the warrants violated the First and Fourteenth Amendments to the United States Constitution. Both tribunals rejected this claim. See Appendix B-1; *Zarick*, 227 Conn. at 219-221.

## REASONS FOR GRANTING THE WRIT

### I. The Defendant's Fourth Amendment Right To Be Secure Against Unreasonable Searches And Seizures Was Violated When The Trial Court Refused To Require The Testimony Of Two Judges Who Had Cooperated In Producing A Search Warrant Directed At The Defendant, Despite An Offer Of Proof By The Defendant That The Magistrates Had Abandoned Their Role As Neutral And Detached Magistrates

Throughout both the suppression hearing and on appeal, the defendant challenged the search warrant yielding evidence against him on the basis that the warrant was not issued by a neutral and detached magistrate. The defendant sought an opportunity to examine both magistrates who were instrumental in producing and approving the warrant – Judge Charles Gill and Judge Anne Dranginis. The first judge, Charles Gill, is a nationally known advocate for children's rights. Testimony during the defendant's offer of proof elicited the fact that Judge Gill tutored investigating officers on how to produce the warrant against Mr. Zarick. Among the items given to the officers by Judge Gill was an FBI investigative manual.

Judge Gill's well-known advocacy on behalf of children is undoubtedly what led the officers to the judge's door. The judge presides in a different judicial district than the one in which the defendant lives. It was, at best, unusual for police officers seeking a warrant to travel outside their jurisdiction seeking counseling on how to make out a warrant.

The defendant also sought to examine the judge who actually signed the warrant, Judge Anne Dranginis. Like Judge Gill, Judge Dranginis presided in a different judicial district than that in which the alleged crimes were to have taken place. The investigating officers met with Judge Dranginis on the evening of the day in which they met Judge Gill. They met Judge Dranginis at her husband's restaurant, a well-known eatery in Litchfield County, and then the following morning at her home. Officers showed Judge Dranginis some, or all, or the 194 photographs in their possession allegedly taken by the defendant and/or his wife. According to the testimony of one officer, the judge found these pictures "disgusting." Either before or after viewing these photographs, the judge signed a sweeping warrant, authorizing seizure of scores of items, ranging from "sexually explicit photographs" to items depicted in the photographs such as an American flag.

The trial court refused to permit examination of the judges by the defendant. On appeal, the state Supreme Court determined that this refusal was not error. The court determined that there was not enough evidence on the record to indicate that Judge Gill and Judge Dranginis ever discussed the warrant – the very issue their testimony was needed to prove. Indeed, in the extraordinarily naive footnote cited above, supra, the court declared it "unlikely" that the two judges would have had the opportunity to discuss the case. *Zarick*, 227 Conn. 214-5, n.7.

This footnote materially misstates the facts. First, the footnote declares that Judge Dranginis was found at a "public restaurant," implying that the officers were lucky

to have found her at all. In fact, she was at a restaurant owned and operated by her husband. Had the defense been able to examine the judges, the evidence would have shown that the location of the restaurant and the fact that Judge Dranginis' husband owned it were facts known to Judge Gill.

The defendant also hoped to prove during his examination of the judges that they enjoyed an extraordinarily close working relationship, thus making it not at all unusual that they would be in close contact regarding a case about which Judge Gill would undoubtedly care deeply. Among the facts the defense hoped to prove was that at or about the time the warrant was issued, the judges shared a common roof, when their families shared the home owned by Judge Gill. The defendant sought to prove that Judge Dranginis' family shared the Gill home while work on the Dranginis home was completed. Given these facts, there is nothing at all unusual about the defendant's suspicion that certain extramural conversations regarding his warrant took place between the two judges.

The failure of the trial court and the state's Supreme Court to permit the examination of these judges deprived the defendant of his right to be secure against unreasonable searches and seizures. This court has long held that the Fourth Amendment's guarantees require "that those inferences [supporting a warrant] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1947); *Connally v. Georgia*, 429 U.S. 245 (1977). "A

magistrate failing to 'manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application' and who acts instead as 'an adjunct law enforcement officer' cannot provide valid authorization for an otherwise unconstitutional search." *United States v. Leon*, 468 U.S. 897, 914 (1984); quoting, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-27 (1979); *United States v. Karo*, 468 U.S. 705 (1984); *Gerstein v. Pugh*, 420 U.S. 103 (1975).

Both the trial court and the state's Supreme Court erred in refusing to permit the defendant to examine the judges to determine whether they had abandoned their roles as neutral and detached magistrates to become "adjunct law enforcement officer[s]." The Supreme Court proved too ready to credit the state's snide assertion in its brief that it was "simply irresponsible" to question whether the judges had discussed this case before the warrant was authorized. In fact, the only witnesses who can testify to whether these conversations took place are the judges themselves.

Given the highly unusual facts in this case, the court erred in refusing to permit the defendant to examine the judges. The defendant respectfully requests that this court remand his case with an instruction that Judge Dranginis and Judge Gill be required to testify to determine whether they did, in fact, abandon their roles as magistrates.

## II. A Photographic Laboratory That Develops Film As An Agent Of Private Photographers Is Engaged In State Action When It Turns Over Photographs It Deems To Be Of A Suspicious Character To Local Police Authorities Pursuant To A Long-Standing Policy Of Cooperating With The Police To Which Both The Laboratory And Police Authorities Have Agreed

The defendant raised a claim at both the suppression hearing and on appeal that the activities of a private photographic laboratory in turning over material to police under a long-standing joint agreement amounted to state action. *Zarick*, 227 Conn. 227-28; Appendices B-1, B-2. Assuming that Guardian's action in turning over the defendant's photographs was state action, the photographs should have been suppressed as having been obtained in a manner that unreasonably burdens the defendant's expectation of privacy in violation of the Fourth Amendment to the United States Constitution. Despite the serious constitutional questions raised by this claim, the Connecticut Supreme Court merely endorsed the findings of the trial court, claiming that there was nothing "clearly erroneous" about the trial court's findings of fact. Id., at p. 227.

To reach this conclusion, the court ignored certain facts presented at trial. In the court's quotation of the trial court's finding of fact, the court omitted a pivotal sentence, *Zarick*, Conn. at 227, n. 20, which indicated that Guardian's policy "was approved by the Auburn police department, . . . " Appendices C, D-2. Ignoring this clause permitted the court to portray the arrangement between

Guardian and the Auburn police department as one initiated and sustained solely by Guardian.

The relevance of the clause omitted by the Connecticut court lies in the fact that the Auburn police department's responsive policy distinguishes the relationship between the laboratory and police from the sorts of exclusively private actions covered by such cases as *Coolige v. New Hampshire*, 403 U.S. 443 (1971); see also *United States v. Coleman*, 628 F.2d 961 (6th Cir., 1980). Guardian's initial decision to turn over suspect material to police officers may well have been "voluntary" in the sense covered by *Coolige*. However, the action must at some point cease being purely private when it is greeted with an approving and corresponding state policy. The facts in this case present the court with an opportunity to determine the point at which joint private-state activity initiated by private actors, but nurtured by both the state and the private party, becomes state action.

That there must come such a point is indisputable. Guardian's offer of the Zarick photographs was not a spontaneous event. It is one in a series of such actions. In fact, testimony at the suppression hearing revealed that the Auburn police officer accepting the Zarick photographs had accepted photographs deemed questionable by Guardian on at least four previous occasions. Appendix D-1. Acting pursuant to police policy, the officer then made arrangements to turn the photographs over to authorities in the jurisdiction from which the photographs were sent. The police role in this case is not that of mere recipients of an evidentiary windfall. The joint and corresponding policies of the police and Guardian amount to Guardian's behaving as an extension of the

police department. A society in which such relationships are nurtured is one in which the Fourth Amendment's guarantees against unreasonable searches and seizures hold little force. Officers could avoid the requirements of the Fourth Amendment simply by failing to investigate crimes but advertising their willingness to accept evidence from private contractors. In this manner, non-state actors could with impunity search or seize all manner of items under cover of acting as private agencies with mere informal relations with police departments. So long as the police did not seek out the contractors, but let the contractors seek them, the activity would arguably not be state action.

This practice presents special dangers in the context of First Amendment freedoms. "The First Amendment imposes special constraints on searches for and seizures of presumptively protected material, and requires that the Fourth Amendment be applied with 'scrupulous exactitude.' " *Maryland v. Macon*, 472 U.S. 463, 468 (1985) (citation omitted). It is clear that the defendants in this case had an expectation of privacy. They expected their photographs to be developed, not broadcast to local police authorities based on the subjective and standardless judgment of a developer untutored in what is and is not obscene or what does and does not impair the health and morals of children. Furthermore, this expectation of privacy is reasonable. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The Auburn police department ought not to be able to hide behind the fiction that its policy with respect to Guardian is not state action. The department has a policy and procedure in place that it uses for responding to evidence routinely brought to its attention

by Guardian. Based on this policy, state authorities come into possession of material without a warrant or any showing of probable cause. Operating under the fiction that the evidence has not been seized within the meaning of the Fourth Amendment, the officers then are free to engage the engines of prosecutorial machinery to inhibit freedoms protected by the First Amendment. It matters not that in some cases the officers detect material that is not protected. The issue is the chilling effect of this carte blanche power of police officers to encourage, through policies of passive cooperation, private bailees to turn over material the bailees find objectionable.

The defendant respectfully requests that the court agree to review the facts in this case to determine whether Guardian's longstanding policy of cooperation with the Auburn police, and the Auburn police department's reciprocal policy of cooperation with Guardian, amounted to state action. This issue merits exacting scrutiny because of the First Amendment issues involved.

## III. The Petitioner's Rights Under Both The First And Fourth Amendments Were Violated When A Warrant Was Issued Based Upon Nothing More Than The Petitioner's Possession Of Photographs Protected Under The First Amendment

Mr. Zarick's case presents this court with a unique opportunity to consider issues raised, but left undecided, in the case of *Knox v. United States*, No. 92-1183. In *Knox*, this court vacated a child pornography conviction under 18 U.S.C. §2252(a)(2)(4) (Supp. 1990) and 18 U.S.C. §2256(2)(E) (1988). This court instructed the lower court

to reconsider its decision with respect to the defendant's convictions in light of the new, and far narrower, definition of child pornography articulated by the Clinton administration. Remanding, *United States v. Knox*, 977 F.2d 815 (1992).

The cases of Mr. Zarick and Mr. Knox rest on similar, in fact, nearly identical, facts. Mr. Knox was convicted based upon his possession certain videotapes allegedly portraying children in pornographic poses. The sexually explicit content making Mr. Knox's tapes objectionable was held by the lower court to violate the prohibition against "lascivious exhibition of the genitals or pubic area." *Knox*, at 819. However, the young women in Mr. Knox's videotapes were clothed and their genitalia were not visible through their clothing. Although the children may have struck provocative poses and the films may have been marketed to an audience with a lascivious interest in children, the children in these films were not engaged in lascivious conduct. These videos are arguably not pornographic as understood by the position articulated by the Clinton Administration in its brief in support of Mr. Knox.[10]

The photographs serving as the basis for the warrant against Mr. Zarick were similar to Mr. Knox's videotapes

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[10] This court's order in *Knox* was issued as this brief was going to the printer. We were unable to obtain a copy of the Solicitor General's brief articulating the Clinton Administration's position filed in *Knox* before the printer's deadline. It was, however, reported in *The New York Times* on November 1, 1993, under the headline "Child Smut Conviction Vacated After U.S. Shift."

in that almost every photograph portrayed a clothed child, and, in no case, was a child ever engaged in lascivious sexual conduct. Thus, the photographs are not pornographic under federal law, and are protected by the First Amendment. Possessing protected photographs cannot give rise to a finding of probable cause to search a home. Thus, the warrant in Mr. Zarick's case was issued without probable cause and in violation of the Fourth Amendment to the United States Constitution.

## CONCLUSION

For the reasons stated above, this Writ of Certiorari should be granted.

Respectfully submitted,

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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## APPENDIX A

### STATE OF CONNECTICUT *v.* NIKOLAI A. ZARICK (14465)

BORDEN, BERDON, NORCOTT, KATZ and DUPONT, JS.

Convicted, following pleas of nolo contendere, of the crimes of employing a minor in an obscene performance, sexual assault in the first degree, sexual assault in the second degree, sexual assault in the fourth degree, being an accessory to sexual assault in the second degree, risk of injury to a child, being an accessory to risk of injury to a child, and conspiracy to commit risk of injury to a child, the defendant appealed to this court. He claimed, inter alia, that the trial court had improperly denied his motion to suppress certain evidence seized from his property pursuant to a warrant and his motion to dismiss certain charges against him. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly refused to allow him to call two Superior Court judges to testify at the suppression hearing regarding their participation in the warrant process; the defendant did not make a sufficient preliminary showing of misconduct on the part of either judge to warrant the extraordinary remedy of calling a Superior Court judge as a witness.

2. The defendant's claim to the contrary notwithstanding, the search warrant that was issued, the seizures made pursuant to that warrant and the denial of the defendant's motion to suppress the evidence seized were not predicated on a violation of the first amendment to the federal constitution; that

trial court correctly determined that the seized photographs depicting naked children constituted evidence of the crime of risk of injury to a child and were not protected by the first amendment.

3. The defendant's claim that the search warrant was issued without probable cause was without merit; the allegations contained in the warrant application of the existence of photographs of naked children together with the assertion by the police that the defendant had engaged in conduct known to be a modus operandi of child molesters were sufficient to allow a magistrate to find probable cause for the crime of risk of injury to a child.

4. The search warrant was not overly broad and general so as to violate the defendant's rights under the fourth amendment; the items not specifically mentioned in the affidavit but authorized by the warrant to be seized during the search could reasonably have been found by the issuing judge to have been the items depicted in the photographs that were described in the affidavit, and the warrant, as a whole, indicated that evidence related to the crime of risk of injury to a child was to be seized.

5. The police were not required to obtain a second search warrant to develop rolls of film they had acquired from the defendant's wife during the course of the search, that search being consented to by the defendant's wife and she having voluntarily surrendered the film to the police as examples of her art.

6. The defendant's claim that certain photographs given to police in Massachusetts by the film developing laboratory to which they had been sent were illegally seized was without merit; the trial court's findings that the film developing laboratory was not an agent of the state and that the photographs did not improperly come into the possession of the Massachusetts police were not clearly erroneous.

7. The defendant having failed at trial to challenge as multiplicitous those counts that he challenges on appeal, this court did not reach his substantive arguments.

Argued March 23 –
decision released August 17, 1993

Substitute information charging the defendant with twenty counts of the crime of risk of injury to a child, fifteen counts of the crime of being an accessory to risk of injury to a child, two counts of the crime of conspiracy to commit risk of injury to a child, one count of the crime of sexual assault in the first degree, eight counts of the crime of sexual assault in the second degree, twelve counts of the crime of being an accessory to sexual assault in the second degree, one count of the crime of sexual assault in the fourth degree and one count of the crime of employing a minor in an obscene performance, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and presented to the court, *Spada, J.*, on pleas of nolo contendere to three counts of risk of injury to a child, four counts of being an accessory to risk of injury to a child, two counts of

conspiracy to commit risk of injury to a child, one count of sexual assault in the first degree, eight counts of sexual assault in the second degree, twelve counts of being an accessory to sexual assault in the second degree, one count of sexual assault in the fourth degree and one count of employing a minor in an obscene performance; judgment of guilty in accordance with the pleas, from which the defendant appealed to this court. *Affirmed.*

*John R. Williams,* for the appellant (defendant).

*Timothy J. Sugrue,* assistant state's attorney, with whom were *John M. Massameno,* senior assistant state's attorney, and, on the brief, *John M. Bailey,* state's attorney, for the appellee (state).

NORCOTT, J. The defendant, Nikolai A. Zarick, appeals from the judgment of conviction, following conditional pleas of nolo contendere pursuant to General Statutes § 54-94a,[1] to the following charges: (1) one count of

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[1] General Statutes § 54-94a provides: "CONDITIONAL NOLO CONTENDERE PLEA. APPEAL OF DENIAL OF MOTION TO SUPPRESS OR DISMISS. When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the rights to take an appeal from the court's denial of the defendant's motion to suppress evidence based on an unreasonable search or seizure, motion to suppress statements and evidence based on the involuntariness of a statement or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

employing a minor in an obscene performance in violation of General Statutes § 53a-196a; (2) one count of sexual assault in the first degree in violation of General Statutes § 53a-70; (3) four counts of being an accessory to risk of injury to a child in violation of General Statutes §§ 53a-8 and 53-21; (4) eight counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1); (5) three counts of risk of injury to a child in violation of General Statutes § 53-21; (6) one count of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A); (7) twelve counts of being an accessory to sexual assault in the second degree in violation of General Statutes §§ 53a-8 and 53a-71 (a) (1); and (8) two counts of conspiracy to commit risk of injury to a child in violation of General Statutes §§ 53a-48 and 53-21.[2] Following this plea, the defendant was sentenced

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[2] General Statutes § 53a-196a provides in part: "EMPLOYING A MINOR IN AN OBSCENE PERFORMANCE: CLASS A FELONY. (a) A person is guilty of employing a minor in an obscene performance when (1) he employs any minor, whether or not such minor receives any consideration, for the purpose of promoting any material or performance which is obscene as to minors, notwithstanding that such material or performance is intended for an adult audience, or (2) he permits any such minor to be employed, whether or not such minor receives any consideration, in the promotion of any material or performance which is obscene as to minors, notwithstanding that such material or performance is intended for an adult audience, and he is the parent or guardian of such minor or otherwise responsible for the general supervision of such minor's welfare."

General Statutes § 53a-70 provides in part: "SEXUAL ASSAULT IN THE FIRST DEGREE: CLASS B FELONY: ONE YEAR NOT SUSPENDABLE. (a) A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force

to a term of imprisonment of twenty-eight years. The

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against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person, or (2) engages in sexual intercourse with a person under thirteen years of age, or (3) commits sexual assault in the second degree as provided in section 53a-71 and in the commission of such offense is aided by two or more other persons actually present."

General Statutes § 53a-8 provides in part: "CRIMINAL LIABILITY FOR ACTS OF ANOTHER. (a) A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he here the principal offender."

General Statutes § 53-21 provides: "INJURY OR RISK OF INJURY TO, OR IMPAIRING MORALS OF, CHILDREN. Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both."

General Statutes § 53a-71 provides in part: "SEXUAL ASSAULT IN THE SECOND DEGREE: CLASS C FELONY: NINE MONTHS NOT SUSPENDABLE. (a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is (1) under sixteen years of age. . . . "

General Statutes § 53a-73a provides in part: "SEXUAL ASSAULT IN THE FOURTH DEGREE: CLASS A MISDEMEANOR. (a) A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age. . . . "

defendant appealed to this court pursuant to General Statutes § 51-199 (b) (3).[3]

The defendant claims that the denial of his motion to suppress evidence seized pursuant to the search warrant was improper because: (1) the trial court refused the defendant's request to require the testimony of Judge Anne C. Dranginis, who had issued the search warrant, and Judge Charles D. Gill, who the defendant claims abandoned his judicial role by providing the police with a Federal Bureau of Investigation pamphlet concerning the preparation of warrants in child molestation cases; (2) the search warrant was issued by a judge who was not neutral and detached; (3) the issuance of the warrant and the seizures that were conducted pursuant to it violated the first amendment to the United States constitution as applied to the states by the due process clause of the fourteenth amendment; (4) the warrant was issued without probable cause; (5) the warrant was sufficiently vague to render it general and overbroad; (6) seizures were made by the police that were not authorized by the warrant; (7) development of film seized by the police

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General Statutes § 53a-48 provides in part: "CONSPIRACY, RENUNCIATION. (a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

[3] General Statutes § 51-199(b) provides in relevant part: "The following matters shall be taken directly to the supreme court . . . (3) an appeal in any criminal action involving a conviction for a capital felony, class A felony, or other felony, including any persistent offender status, for which the maximum sentence which may be imposed exceeds twenty years. . . . "

constituted an additional search that required securing a second warrant to authorize that search under the United States and Connecticut constitutions; and (8) the acquisition by the Massachusetts police of 194 photographs constituted an illegal seizure of those photographs, thus tainting the subsequent issuance of the warrant. The defendant also claims that he was convicted of multiple crimes arising out of a single offense, which constituted a violation of the fifth amendment to the United States constitution as applied to the states by the due process clause of the fourteenth amendment and the separation of powers provisions of article second of the Connecticut constitution. We now affirm the judgment of the trial court.

The trial court found the following facts in connection with the defendant's motion to suppress. On or about August 19, 1987, Robin Zarick, the wife of the defendant, left several rolls of film at a Shop Rite supermarket in Bristol to be developed. The film was forwarded to Guardian Photo (Guardian), a commercial developing laboratory in Auburn, Massachusetts. Guardian had a company policy to bring to the attention of the police questionable photographs sent to it for development.

On August 21, 1987, Guardian's plant manager brought the Zarick photographs to the attention of the Auburn police department. On the basis of Robin Zarick's return address on the film developing envelopes, the Auburn police referred the matter to the police in Plymouth, Connecticut, and delivered the photographs to the

Plymouth police department These photographs (hereafter, the Massachusetts photographs) consisted of 194 photographs, some of which depicted breasts and genitalia of children, as well as naked boys and girls in sexually explicit positions and poses. In addition, some of the Massachusetts photographs depicted costumed children wearing heavy makeup in sexually suggestive poses.

After viewing these photographs, officers of the Plymouth police department prepared a search warrant application for the Zarick estate in Plymouth. One of the officers responsible for preparing the search warrant application consulted Superior Court Judge Charles D. Gill for advice in connection therewith.[4] Judge Gill was known by the officer to be an expert in the area of abused and neglected children. Judge Gill provided the officers with a Federal Bureau of Investigation pamphlet and an investigative manual from the Center for Missing and Exploited Children.

Subsequently, on the evening of August 22, 1987, the Plymouth Police took the completed warrant application to Judge Anne C. Dranginis for her review.[5] In addition to the warrant application, the officers brought with them the Massachusetts photographs for Judge Dranginis to

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[4] The record indicates that this matter was the first instance of potential child molestation to have been investigated by these officers in some time, a fact which may account for the officers' desire to seek assistance in connection with the preparation of the warrant application.

[5] Judge Gill had instructed the officers to bring the warrant application, when complete, to another judge for review and issuance.

examine. Judge Dranginis concluded that the warrant application showed probable cause for the crime of risk of injury to a child and issued the search warrant. The record does not indicate whether Judge Dranginis examined the Massachusetts photographs prior to or subsequent to the issuance of the warrant.

The warrant was executed on the morning of August 23, 1987. The police seized numerous items of evidence, including sexually explicit photographs, undeveloped film, props and model release forms prepared by the defendant or Robin Zarick. The police also left a significant amount of evidence that they deemed not to fall within the ambit of items described in the warrant.

The defendant filed several motions to suppress evidence seized in connection with this search and to dismiss certain of the charges against him. The trial court denied these motions in part.[6] Following adverse rulings on these motions, the defendant entered pleas of nolo contendere to the above-referenced thirty-two charges. This appeal followed the ensuing judgment of conviction.

I

The defendant first claims that the trial court improperly refused to allow him to call Judge Dranginis and Judge Gill to testify at the suppression hearing. The defendant argued that such testimony was required to allow him to explore the extent and scope of assistance provided to the police by Judge Gill, and any possible

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[6] The trial court did suppress several items of evidence, including a pair of handcuffs and a pornographic book.

communication between Judge Gill and Judge Dranginis that could have tainted the warrant process and Judge Dranginis' state of mind when she issued the warrant. We disagree.

A

The defendant sought to call Judge Gill to determine whether he had discussed the warrant affidavit with Judge Dranginis prior to its issuance. There is no evidence in the record to indicate that such a discussion occurred.[7] The record also indicates that Judge Gill's assistance to the police consisted solely of providing a Federal Bureau of Investigation pamphlet and manual from the Center for Missing and Exploited Children.[8]

The threshold for requiring the testimony of sitting Superior Court judges as witnesses is high. Such compulsion in Connecticut is disfavored because of concern with the interruption of court business as well as a desire to avoid abuse or harassment of sitting judges. *Woodward v. Waterbury*, 113 Conn. 457, 465, 155 A. 825 (1931); see also

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[7] Indeed, given the speed with which the officers prepared the warrant application on Saturday, August 22, 1987, and then located Judge Dranginis during the evening of the same day at a public restaurant for the purpose of review and issuance of the warrant, it is unlikely that Judge Dranginis and Judge Gill would have had the opportunity for any of the contact upon which the defendant speculates.

[8] While it is unusual for the police to solicit assistance from a judge while preparing a warrant application, we can infer that here, the police were motivated by a desire to produce an application that would allow for quick issuance of the warrant given the potential ongoing danger to minor children.

C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 7.8. To challenge the veracity or accuracy of statements made by an affiant in connection with the preparation of a warrant, a defendant must make a "substantial preliminary showing" of misconduct by the affiant. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L.Ed. 2d 667 (1978); *State v. Rodriguez*, 223 Conn. 127, 144, 613 A.2d 211 (1992).[9]

A defendant challenging the role of an issuing judge in connection with the issuance of a warrant presents a claim analogous to the challenge of an affiant's statements under *Franks v. Delaware*, supra. Such a challenge requires at a minimum the same substantial preliminary showing of misconduct that is required in the case of a challenge to an affiant's statements. Our review of the record indicates that there has been no showing by the defendant of any misconduct on the part of Judge Gill that would have justified calling him as a witness. Unsubstantiated, purely speculative assertions cannot substitute for such a showing.

B

The defendant also sought to call Judge Dranginis to question her in connection with her viewing of the

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[9] We note in this connection that the offer of proof required by *Franks* to mandate an evidentiary hearing "should be accompanied by a statement of supporting reasons," and that "[a]ffidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Massachusetts photographs. He claims that viewing the photographs may have influenced her decision as to the existence of probable cause by causing her to lose her neutrality. In the alternative, the defendant argues that viewing the photographs would have prevented a finding of probable cause by Judge Dranginis because the affidavit exaggerates the sexual content of the photographs. We disagree.

Although it is not in dispute that Judge Dranginis viewed some portion of the Massachusetts photographs, the record does not establish whether she viewed them before or after issuing the warrant.[10] Judge Dranginis' viewing of the photographs was irrelevant to the propriety of the issuance of the warrant, because the information contained within the four corners of the supporting affidavit was sufficient to allow a judge to find probable

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[10] Officer Michael Luba of the Plymouth police department, one of the officers who delivered the completed warrant application and the Massachusetts photographs to Jude Dranginis, testified in relevant part:

"[Assistant State's Attorney:] Now, you testified concerning Judge Ann Dranginis' examination of the photographs from Auburn, Massachusetts?

"[Officer Michael Luba:] Yes.

"Q. Do you recall when she examined those photographs with regard to the signing of the warrant, whether it was before or after?

"A. No. I don't.

"Q. Do you recall whether she made any remark in addition to the remark that she found them disgusting?

"A. No, I don't recall any other remarks.

"Q. But she did examine them in your presence?

"A. Yes."

cause to issue the warrant.[11] *State v. Couture*, 194 Conn. 530, 536, 482 A.2d 300 (1984), cert. denied, 469 U.S. 1192, 105 S. Ct. 967, 83 L. Ed. 2d 971 (1985).

The defendant made no preliminary showing that would have entitled him to an evidentiary hearing regarding any judicial misconduct by Judge Dranginis. The evidence that she, in fact, viewed some of the photographs was presented only because the trial court nonetheless permitted the defendant to examine the police officer regarding the facts surrounding the issuance of the warrant. Thus, this claim suffers from the same flaw as the claim regarding the refusal of the trial court to permit the defendant to call Judge Gill as a witness: the defendant did not make a sufficient preliminary showing of misconduct to warrant the extraordinary remedy of calling a Superior Court judge as a witness.

Furthermore, even if we were to regard the testimony of the police officer as the functional equivalent of an attempt by the defendant to make a substantial preliminary showing of misconduct, that showing was insufficient to mandate calling Judge Dranginis as a witness. If Judge Dranginis viewed the photographs after signing the warrant, there was not even an arguable impropriety on her part, because she had already properly performed her judicial task of viewing the warrant application based

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[11] Because we conclude that the facts contained within the warrant application were sufficient to allow the issuing judge to find probable cause to issue the warrant, we need not decide whether viewing photographs in connection with an otherwise inadequate warrant application would have been sufficient to allow a judge to issue the warrant.

upon the material disclosed within the four corners of the affidavit.

The defendant's claim, therefore, rests upon the assertion that Judge Dranginis viewed the photographs before signing the warrant, an arguably improper act only because the photographs, which were described by the affidavit, were not, however, specifically made part of the supporting affidavit. That claim also fails because of an insufficient preliminary showing of misconduct.

A Superior Court judge issuing a search warrant is presumed to have performed his or her function properly, until shown to the contrary. *State v. Diaz*, 226 Conn. 514, 544-45 n.17, A.2d (1993). The evidence adduced by the defendant in support of his assertion of impropriety on Judge Dranginis' part, however, was as consistent with the proper exercise of her duties as it was consistent with an arguable impropriety in the exercise of her duties. Given this equipoise in the defendant's purported preliminary showing, that evidence was insufficient to warrant further factual inquiry by the extraordinary remedy of calling Judge Dranginis as a witness.

The defendant's alternative claim, that viewing the photographs would illuminate a material misrepresentation in the affidavit supporting the warrant, is essentially a claim under *Franks v. Delaware*, supra, that the warrant affidavit was misleading. In *Franks*, the United States Supreme Court held that if a defendant makes "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary for a

finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." Id., 155-56; see also *State v. Rodriguez*, supra, 143; *State v. Weinberg*, 215 Conn. 231, 237, 575 A.2d 1003, cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 413 (1990). We have previously noted that "[t]here is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory. . . . There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." (Internal quotation marks omitted.) *State v. Rodriguez*, supra, 143, quoting *Franks v. Delaware*, supra, 171.

Judge Dranginis's testimony was not necessary to resolve the claim that the Massachusetts photographs were misrepresented in the affidavit. The defendant did not make a substantial preliminary showing of impropriety in connection with the preparation of the warrant application by the Plymouth police or in the review of the warrant application by Judge Dranginis. He has simply raised unsupported claims. Consequently, there was no basis for a *Franks* hearing in this case.[12]

[12] We note in passing that, notwithstanding the fact that the defendant had not made the requisite substantial preliminary showing, with an abundance of caution, the trial court considered and rejected the defendant's allegation that the Massachusetts photographs were inaccurately described in the warrant application.

II

The defendant claims that the search warrant that was issued, the seizures that were made pursuant to the warrant and the denial of the motion to suppress the evidence seized were all predicated upon a violation of the first amendment to the United States constitution as made applicable to the states by the due process clause of the fourteenth amendment. We disagree.

The defendant's claim is based on a reading of *State v. Palangio,* 24 Conn. App. 300, 303-304, 588 A.2d 644, cert. denied, 218 Conn. 911, 591 A.2d 813 (1991), which, he claims, holds that the photographing of naked children is a per se violation of General Statutes § 53-21,[13] and that such a per se rule violates the first amendment. The defendant has misread *Palangio,* and has misinterpreted the applicability of that decision to this case.

In *Palangio,* the Appellate Court indicated that in certain circumstances photographing naked or partially naked children can be a violation of § 53-21. That case does not, however, set forth a per se rule that such action is always a violation of § 53-21. Furthermore, the warrant application prepared by the Plymouth police sought evidence of the crime of risk of injury to a minor. The warrant application did not allege the existence of and did not seek to seize obscene material qua obscene material. The trial court correctly held that the photographs seized pursuant to the warrant constituted evidence of the crime of risk of injury to a child. The photographs

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[13] See footnote 2.

memorialized situations created by the defendant that were likely to impair the health or morals of children. Such material is not protected by the first amendment. We are also unconvinced by the defendant's assertion that because of the "artistic merit" of the photographs seized, the warrant and the seizures thereunder should be subject to greater judicial scrutiny. Claims of artistic value do not override what is otherwise evidence of criminal activity. See generally *New York v. Ferber,* 458 U.S. 747, 761-64, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

III

The defendant next claims that the search warrant was issued without probable cause. As a preliminary matter, we note that the defendant has not adequately raised this issue in his brief. Although his brief has a heading that makes reference to a lack of probable cause, the text of the argument that the defendant makes under that heading addresses the issue of the breadth of the warrant and the authority it conferred upon the police to seize particular items, issues we address in part IV of this opinion.

The defendant does not make any reasoned argument that the warrant and the underlying affidavit were insufficient to establish probable cause for the crime of risk of injury to a child. An appellant who fails to brief a claim abandons it; *State v. Tatum,* 219 Conn. 721, 742, 595 A.2d 322 (1991); *Liscio v. Liscio,* 204 Conn. 502, 507, 528 A.2d 1143 (1987); *Petrizzo v. Commercial Contractors Corporation,* 152 Conn. 491, 496, 208 A.2d 748 (1965); see generally Practice Book § 4065.

A liberal (and perhaps overly generous) construction of a single sentence of the defendant's brief,[14] however, could enable us to reach the question of probable cause for the issuance of the warrant. Giving the defendant the benefit of the doubt on the question of whether the issue of probable cause has been adequately raised on appeal, we conclude that probable cause existed for the issuance of the warrant.

The affidavit accompanying the warrant stated in relevant part that: (1) the police had 194 photographs in evelopes bearing the return address of Robin Zarick, the defendant's wife. These photographs "showed . . . children completely nude and partially clothed. The photos showed the vaginal area, breasts and penis area of the juveniles. That some of the photos showed the children dressed in costumes and with heavy makeup on their faces. Other photos showed the children caressing while nude and the children appeared to pose for some of the photos. . . . [T]he photos show young children in sexually explicit positions and caressing each other while naked and partially naked"; (2) the defendant was in one of the photographs holding a naked child; and (3) the defendant had been identified in four separate incident reports by the Waterbury police department as having been photographing young children from his vehicle, and that such activity is a modus operandi of child molesters.

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[14] Specifically, "[t]he affidavit upon which the warrant was issued did not in any sense allege that any of the 194 photographs was 'sexually explicit' and certainly a review of those photographs would confirm this fact."

The standard of review for an issuing judge's determination that probable cause existed to issue a search warrant is to consider the information before the issuing judge at the time of the issuance of the warrant, together with the reasonable inferences drawn from such information, in the light most favorable to the issuing judge's determination of probable cause. *United States v. Spears*, 965 F.2d 262, 268-71 (7th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 502, 121 L. Ed. 2d 438 (1992); *State v. Johnson*, 219 Conn. 557, 565, 594 A.2d 933 (1991); see generally *State v. Diaz*, supra, 536-40, and cases cited therein.

In determining whether probable cause exists to conduct a search, a "totality of the circumstances" test is used. *Illinois v. Gates*, 462 U.S. 213, 233, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *State v. Johnson*, supra, 562; *State v. Barton*, 219 Conn. 529; 545, 594 A.2d 917 (1991). "[P]robable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, supra, 232. In determining the existence of probable cause to search, the magistrate should "make a practical, commonsense decision whether, given all of the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id., 238; *State v. Johnson*, supra, 563. "In making this determination [of probable cause], the magistrate is entitled to draw reasonable inferences from the facts presented. When a magistrate has determined that the warrant affidavit presents sufficient objective indicia of reliability to justify a search and has issued a warrant, a court reviewing that warrant at a subsequent suppression

hearing should defer to the reasonable inferences drawn by the magistrate." (Internal quotation marks omitted.) *State v. Rodriguez*, supra, 135.

In the present case we conclude that the allegations, contained in the warrant application, of the existence of numerous photographs of naked children in sexually suggestive costumes and poses connected with the defendant, as well as the assertion that the defendant was engaged in conduct known to be a modus operandi of child molesters, was sufficient to allow a judge to find probable cause for the crime of risk of injury to a child. We therefore reject this claim of the defendant.

IV

The defendant next claims that the search warrant was overbroad and general in violation of the fourth amendment to the United States constitution, as made applicable to the states by the due process clause of the fourteenth amendment, and article first, § 7, of the Connecticut constitution.[15] The defendant argues that the warrant was unconstitutionally general in two ways: (1) it authorized seizure of items to which no reference was made in the supporting affidavit; and (2) it authorized the seizure of broad categories of items in terms so general as to allow the executing officers to substitute their own

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[15] The defendant has made only a cursory reference to article first, § 7, of the Connecticut constitution. He has failed adequately to raise a claim of enhanced protection under the state constitution. Thus, we consider only his fourth amendment claim. *State v. Perez*, 218 Conn. 714, 723, 591 A.2d 119 (1991).

judgment for that of the issuing judge. Either alleged defect, the defendant claims, rendered the issuance of the warrant unconstitutional. We disagree.

The text of the warrant authorized the seizure of the following items: "Sexually explicit photographs, negatives, slides, magazines, movies, videotapes, audiotapes, handwritten notes, photographs, art, sex education books, photograph albums and displays, photocopies of photographs or pictures, drawings and tracings, cut and paste pictures, articles of clothing, costumes, jewelry and personal items, charts and records, computers and peripheral equipment, sexual aids, video and photography equipment, Pedophile manuals, photographic reproduction materials, U.S. Flag torn at top near blue and white stars, bill board background with nude and partially clad children and adults, white shredded shirt, black bead necklace with large white teeth attached to it, black robe with white embroidered design on right shoulder, large wooden walking stick, gold and white colored fur hand warmers, black and white animal fur skin, black lace headband, black fur, leopard skin designed belt, pink and blue cloth type bracelet, 1981 Ford LTD bearing Ct. passenger registration plate 271DAF registered to Nikolai Zarick."

In reviewing a warrant application, a magistrate may apply ordinary dictates of common experience and common sense and may draw normal inferences from the facts alleged in the affidavit. *State v. Romano,* 165 Conn. 239, 245, 332 A.2d 64 (1973). The items that were not mentioned in the affidavit but were authorized to be

seized by the warrant[16] could reasonably have been found by the issuing judge to have been the props and costumes depicted in the Massachusetts photographs that were described in the affidavit. There was no fourth amendment violation of the defendant's rights by the seizure of these items.

Similarly, we are unconvinced by the defendant's assertion that the warrant was drafted in terms so overbroad as to render it unconstitutional.[17] The description of items to be seized in a warrant need only be as specific as the circumstances and the nature of the activity under investigation permit. *State v. Ruscoe*, 212 Conn. 223, 234 563 A.2d 267 (1989), cert. denied, 493 U.S. 1084, 110 S. Ct. 1144, 107 L. Ed. 2d 1049 (1990); *State v. Vincent*, 30 Conn. App. 249, 257-58, 620 A.2d 152, cert. granted, 225 Conn. 917, 623 A.2d 1026 (1993). In this case, the warrant, read as a whole, indicated that evidence related to the crime of risk of injury to a child was to be seized. References to "sexually explicit" material, as well as terms such as

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[16] Those items were, specifically, a "U.S. Flag torn at top near blue and white stars, bill board background with nude and partially clad children and adults, white shredded shirt, black bead necklace with large white teeth attached to it, black robe with white embroidered design on right shoulder, large wooden walking stick, gold and white colored fur hand warmers, black and white animal fur skin, black lace head band, black fur, leopard skin designed belt, pink and blue cloth type bracelet."

[17] In a related claim, the defendant asserts that certain photographs were unlawfully seized because they were in packages containing both sexually explicit and nonexplicit photographs. This claim is without merit. A person cannot insulate contraband from discovery by hiding it with items that are not evidence of criminal conduct.

"sexual aids" and "Pedophile manuals," gave the executing officers sufficient guidance to prevent a "general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

V

The defendant claims that the police were required to obtain a second search warrant to develop sixty-one rolls of film that they acquired from Robin Zarick during the course of their search of the Zarick estate. He argues that the failure of the Plymouth police to obtain a second warrant prior to developing the film violated his rights under the fourth amendment, as made applicable to the states by the due process clause of the fourteenth amendment, and article first, § 7, of the Connecticut constitution,[18] and rendered the results of that search inadmissible. We disagree.

We need not reach the issue of whether a separate warrant is required to develop film seized pursuant to a lawful search because even if such a warrant were required, the search was consented to by Robin Zarick. She voluntarily surrendered the undeveloped film to the police as an example of her art. Implicit with the surrender of the film was the expectation that such film would

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[18] The defendant has made only a cursory reference to article first, § 7, of the Connecticut constitution. He has failed adequately to raise a claim of enhanced protection under the state constitution. Therefore, we address only his fourth amendment claim. *State v. Perez*, 218 Conn. 714, 723, 591 A.2d 119 (1991).

be developed. A "search . . . is not unreasonable under- . . . the fourth amendment to the constitution of the United States . . . if a person with authority to do so has freely consented. . . . *Schneckloth v. Bustamonte,* 412 U.S. 218, 248, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *Dotson v. Warden,* 175 Conn. 614, 618, 402 A.2d 790 (1978)." (Internal quotation marks omitted.) *State v. Reagan,* 209 Conn. 1, 7, 546 A.2d 839 (1988). Whether there was valid consent to a search is a factual question that will not be lightly overturned on appeal. *United States v. Sanchez-Jaramillo,* 637 F.2d 1094, 1098 (7th Cir.), cert. denied, 449 U.S. 862, 101 S. Ct. 166, 66 L. Ed. 2d 79 (1980).

The trial court found, and the defendant does not dispute, that Robin Zarick's surrender of the film was voluntary.[19] There was no violation of the defendant's fourth amendment rights as a result of this voluntary surrender of evidence to the police.

VI

The defendant also claims that the Massachusetts photographs were illegally seized either by Guardian, acting as an agent of the Commonwealth of Massachusetts or by the Massachusetts police. Such an illegal

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[19] Specifically, the trial court found: "These sixty-one rolls this Court finds admissible because they were consensually turned over by Robin Zarick to Officer Diane Derzewicki. . . . The evidence was uncontradicted and substantial that Robin Zarick in an effort to describe her activity as either legitimate or artistic provided voluntary statements, furnished model releases, displayed photographs and turned over rolls of undeveloped film to the police."

seizure, the defendant argues, tainted the warrant that was subsequently issued as a result of the discovery by the police of the Massachusetts photographs. We disagree.

The determination of whether Guardian was acting as an agent of the state is a question of fact to be determined by the trial court. In this instance, the trial court found that there was no evidence that Guardian was an agent of the state.[20] The evidence supporting the trial court's finding includes the facts that: (1) the policy of turning over questionable photographs to the police was initiated by Guardian; (2) the decision to turn over specific photographs was entirely up to a Guardian manager; (3) there was no supervision or random checking of Guardian by the police in connection with this policy; and (4) there were no instructions or rules regarding such policy promulgated by the police.

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[20] Specifically, the trial court found: "The suggestion that Guardian Photo Lab was an agency of the Auburn Police Department is a suggestion neither warranted nor supported by the evidence. Guardian Photo Lab initiated and promulgated a policy which it implemented by turning over to local police questionable photos. The decision to turn over pictures rested exclusively with the private laboratory. No one from the Auburn Police Department either supervised or randomly checked the development process of Guardian Lab. No instructions, rules or regulations or policy was directed from the Auburn police to Guardian Lab. The evidence unequivocally established that the practice of turning over questionable photos to the local police was consistent with a policy solely formulated and implemented by the Guardian Photo Lab Company. The lab company was not an agency of the Auburn Police Department."

Factual matters are determined by the finder of fact and are not subject to reversal on appeal unless such findings are clearly erroneous. *Groton v. Yankee Gas Services Co.*, 224 Conn. 675, 691, 620 A.2d 771 (1993); *Crowell v. Danforth*, 222 Conn. 150, 156, 609 A.2d 654 (1992). The trial court's findings that Guardian was not an agent of the state and that the Massachusetts photographs did not improperly come into the possession of the Massachusetts police were not clearly erroneous. Because no seizure of the photographs occurred, the defendant's claim of a violation of his fourth amendment rights is without merit.

VII

Finally, the defendant claims that the trial court improperly denied his motion to dismiss certain counts against him as multiplicitous and violative of the fifth amendment, as made applicable to the states by the due process clause of the fourteenth amendment, and article second of the Connecticut constitution.[21] A review of the record indicates that the defendant has not preserved his right to challenge the claims he now challenges as multiplicitous and, thus, we do not reach his substantive arguments.

The record indicates that the defendant filed a pretrial motion to dismiss certain counts against him as multiplicitous. This motion failed to identify which

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[21] The defendant has not adequately raised claims under article second of the Connecticut constitution. Such claims are considered abandoned. See footnotes 15 and 18.

counts the defendant claimed were multiplicitous. In the trial court, the defendant challenged counts 17, 21, 23, 25, 27, 29, 44 and 48 as multiplicitous. On appeal, the defendant claims that counts 7, 8, 16, 18, 20, 22, 24, 26, 28, 35, 37, 39, 41, 43, 45, 51, 52, 57 and 58 are multiplicitous. Because the defendant did not challenge as multiplicitous in the trial court the counts that he now challenges on appeal, he has waived his right to challenge those counts that he challenges on appeal.

The judgment is affirmed.

In this opinion BORDEN and DUPONT, Js., concurred.

BERDON, J., concurring. I write separately because I would order the parties to rebrief the issue of whether there was probable cause to search the defendant's home. *Genovese v. Gallo Wine Merchants, Inc.*, 226 Conn. 475, 479, ___ A.2d ___ (1993). As the majority points out, the defendant did not adequately brief the issue, but merely raised it in one sentence. In *Genovese*, we, on our own, raised the applicability of a statute and ordered rebriefing by the parties to discuss that statute. "Certainly, if we may use this newly established procedure to achieve justice on behalf of civil litigants, where only money is involved, we must do likewise when an individual's liberty is at stake." Id., 496-97. (*Berdon, J.*, dissenting.).

Alternatively, I would not reach the merits of the probable cause issue. "Claimed errors not adequately briefed and not fully developed will not be considered by this court." *State v. Tatum*, 219 Conn. 721, 742, 595 A.2d 322 (1991). Accordingly, I would treat the issue as having been abandoned by the defendant and leave it to be raised in a different forum.

Furthermore, I am troubled by the analysis of the probable cause issue. The court seems to rely on the "totality of the circumstances" test to support its conclusion that there was sufficient facts for the magistrate to find probable cause to search the house. When this court adopted the "totality of the circumstances" test in *State v. Barton*, 219 Conn. 529, 594 A.2d 917 (1991), it did so in the context of reviewing a search warrant application based on information provided to the police by a confidential *informant*. The warrant affidavit in *Barton* contained insufficient information to satisfy the *Aguilar-Spinelli* test, which requires a magistrate "to evaluate both the 'basis of knowledge' and the 'veracity' or 'reliability' of an informant upon whose information the police have relied. See [*State v. Kimbro*, 197 Conn. 219, 233-37, 496 A.2d 498 (1985)]; see also *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964)." *State v. Barton*, supra, 533.

In *Barton*, Chief Justice Peters wrote the following: "When a search warrant affidavit is based on information provided to the police by confidential informants, the magistrate should examine the affidavit to determine whether it adequately describes both the factual basis of the informant's knowledge and the basis on which the police have determined that the information is reliable. If the warrant affidavit fails to state in specific terms how the informant gained his knowledge or why the police believe the information to be trustworthy, however, the magistrate can also consider all the circumstances set forth in the affidavit to determine whether, despite these

deficiencies, other objective indicia of reliability reasonably establish that probable cause to search exists." Id., 544.

*Barton* did not hold, as the majority suggests, that "[i]n determining whether probable cause exists to conduct a search, a 'totality of the circumstances' test is used." Rather, in *Barton,* this court held that any deficiency in the informant's reliability or basis of knowledge could be satisfied by considering the "totality of the circumstances." Whether the information furnished by the informant together with other firsthand information supplied by the affiants reaches the level of probable cause does not involve a totality of the circumstances analysis. Likewise, if there is no informant, as in the present case, a totality of the circumstances analysis is inappropriate. The court's use of the totality of the circumstances test to determine whether the information contained in the warrant constitutes probable cause further dilutes the protections of article first, § 7, of the Connecticut constitution. *State v. Diaz,* 226 Conn. 514, 560 n. 13, ___ A.2d ___ (1993) (*Berdon, J.,* dissenting).

I concur in the result.

KATZ, J., concurring. I concur in the result.

**APPENDIX B-1**

[p. 812] SUPERIOR COURT
JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN
AT HARTFORD

STATE OF CONNECTICUT CR-88-60409
VS.

NIKOLAI ZARICK DECEMBER 3, 1991

Before: THE HONORABLE ARTHUR SPADA

Appearances:

For the Plaintiff: JOHN MASSAMENO, ESQ.
JENNIFER SANDERS, ESQ.

For the Defendant,
Nikolai Zarick: JOHN WILLIAMS, ESQ.

Robin Buscetto
Court Reporter

* * *

[p. 813] THE COURT: The motion to dismiss, there are several of them, but the one dated – all apparently dated October 8, calls for a dismissal of the substituted information dated October 4, 1991, for the reason that the conduct alleged is protected by the provisions of the First and Fourteenth Amendment, apparently based on the several cases brought to the Court's attention, including those cases that were submitted for the Court's study and reading, including the most recent case, Walter versus United States, State versus Petrone and also State versus Palangio. The Court deems that the assertion of First Amendment protection is not accordable [sic] to the

conduct before the Court, therefore, that motion is denied and exception is granted.

There is a motion to dismiss also dated October 8 with a full length paragraph in which it essentially states in the third sentence fails to allege an exact date or allege a date with sufficient specificity is the matter before the Court. The Court has determined, as both counsel are fully aware, that an exact date is not required, that the [p. 814] State has the burden and it's encumbent upon the State to make available as specifically as possible that period of time to which it is alerted to or to which it has knowledge of. To the extent that the period of time made available to the defendant reflects accurately that period of time which the State is aware of, then to that extent no exact date is required and the dates set out as best as the State can set them out are deemed to be sufficient and adequate for purposes of the bill of particulars.

The question is whether the lack of specificity concerning the timeframe from May 1987 to August, 1987, precludes the defendant from producing any sufficient defenses. The Court states in passing that all police reports, all photographs and all exhibits which the State plans to submit have been made available to the defendant. The defendant is aware of the approximate timeframe and aware of the proscribed conduct that has been charged. There has been no alibi submitted yet as to a specific date or time, and alibi, of course, is not precluded to the extent one [p. 815] is made available; but the Court is satisfied given the constraints and limitations of child victims of such tender ages that the inability to be more specific than has been provided in the bill of

particulars is sufficient, adequate and meets the standards of the practice book. The motion to dismiss is denied. Exception noted.

Now, there was another motion to dismiss, October 8, which dismissed counts one, two, three, four, thirty, thirty-one and sixty. The Court finds that the offenses as pertain to accessory to commit the crime of risk of injury is sufficiently particularized as to paragraphs – as to paragraphs two, three and four. They pertain to apparently – and one apparent pertains to child Y, two, three and four pertains to child A, Y and K. The Court is satisfied that the allegations in the bill of particulars are sufficiently specific and adequate to set out an offense.

As to paragraph thirty, Mr. Williams was correct that the definition of sexual contact under 53a-73(a)(1)(a), having sexual contact with children under age fifteen, that phrase [p. 816] as defined requires an allegation of sexual gratification of the actor or degrading the person, although I would suspect that it is implicit because of the definition, but for bill of particular purposes – and Mr. Massameno, you had indicated you had no reservations – the Court would, therefore, order as to paragraph thirty the additional language pertaining to the definition of sexual contact be made available in the bill of particulars because that definition is also in the alternative. To the extent Mr. Williams may want more detailed information as to whether it is for sexual gratification of the actor or for degrading the person being touched, the Court will order that additional language be made available in the substituted paragraph thirty. To the extent count thirty-one involves a sexual contact, therein the State is required

to make available which portion of the definition of sexual contact is being alleged. And excepting what with the modifications required as to counts thirty and thirty-one, the remainder of the motion is denied and exception is noted.

[p. 817] Now, there will be – and I apologize beforehand. There will be some redundancy because I am essentially in a final draft, so to the extent that it might become a little burdensome, I herewith tender my apologies to all counsel.

The hearing concerning the defendant's motion to suppress was extensive, tedious, occasionally contentious, but always intellectually stimulating. The motion raises many issues, some of which are issues of first impression in this state.

The first issue raised is whether the defendant has standing to contest a delivery to the Plymouth police of the one hundred and ninty [sic]-four photographs. It is undisputed that the defendant's wife Robin Zarick on a grocery shopping trip on August 19, 1987, deposited several canisters of film at a Shop Rite store in Bristol for development. Robin Zarick placed them in the envelope, inscribing her name, address and telephone number on the envelope. The envelope was delivered to Guardian Photo Labs in Auburn, Massachussets [sic] for development.

[p. 818] There was evidence that the film was jointly owned, that the cost of developing and printing these films was a joint and/or family project. The defendant's explanation given the financial circumstances of the family at this time that the purchase and processing of the

film was a joint family project paid for from a community of funds is reasonable and credible. This Court accordingly finds that the defendant Nickolai Zarick has standing to contest the delivery of these one hundred and ninty [sic]-four pictures to the Plymouth Police Department.

Now, the second and more critical issue is whether the defendant had a subjective expectation of privacy in the film deposited with Shop Rite and developed by Guardian Photo, and whether society must accept this expectation as objectively reasonable. Both Zaricks put the photos in transit either by mail or courier with Robin's name, return address and telephone number. This conduct was an announcement to the community that the subject film belonged to them. This Court can reasonably infer that the defendant was aware [p. 819] that an employee or employees of Guardian Photo Lab would view the pictures and have possession of them. There was no evidence of instructions to Guardian Photo Lab that the subject film was to be developed overtly or that its confidentiality maintained or that it was restricted from being released to the police or other concerned agencies. Quoting from Katz versus U.S., 389, 347, "what a person knowingly exposes to the public even in his own home or office is not a subject of Fourth Amendment protection". The information voluntarily conveyed is not within the ambit of the Fourth Amendment. Quoting from Smith versus Maryland, 442 U.S. 735, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties". Under the circumstances, the defendant fully anticipated that third parties, that is employees of Guardian Photo Lab, would develop the

film, print the negatives and examine those prints. It could be further inferred that the defendant anticipated these pictures would be viewed also by employees of Shop Rite.

[p. 820] The evidence established indisputably that when the defendant sought to preserve the privacy of certain film he wanted developed, films containing nudity or acts of sexual intercourse with minors, he would patronize a Bill Weir, W-E-I-R, who operated a private photo development lab.

The defendant testified that he did not take any of the Auburn pictures, was not present when Robin took them except for those pictures with his stepson and, "had no idea what was on those rolls". It is a reasonable inference that these films were deposited with Shop Rite in part because the defendant was unaware that these films contained pictures of posing nude children. The defendant accepted the risk that Guardian Lab would turn over to local police the subject pictures. To argue retroactively the pictures constitute his version of art and, therefore, are shielded by the First Amendment is a misplaced contention and one that finds little or no support in law.

A second prong in this analysis is whether society will accept this expectation [p. 821] as objectively reasonable. This Court concludes that an expectation of privacy in photos of seven and eight year old children unrelated to the defendant and posing in the nude in an area of heavy foliage and waterfall background is not objectively reasonable and not a privacy which society would consider reasonable for protection.

Now, the policy to turn over questionable photographs to the Auburn Police Department was a policy initiated and maintained by the Guardian Photo Labs. See Exhibit A. Although the policy was approved by the Auburn Police Department, the evidence established that Guardian Photo Lab had a nationwide policy amongst its photo lab branches to turn over to local police pictures they deem to be questionable. Photographs of posing nude children come within this orbit of questionability. The suggestion that Guardian Photo Lab was an agency of the Auburn Police Department is a suggestion neither warranted nor supported by the evidence. Guardian Photo Lab initiated and promulgated a policy which it implemented by turning over to local police [p. 822] questionable photos. The decision to turn over pictures rested exclusively with the private laboratory. No one from the Auburn Police Department either supervised or randomly checked the development process of Guardian Lab. No instructions, rules or regulations or policy was directed from the Auburn police to Guardian Lab. The evidence unequivocally established that the practice of turning over questionable photos to the local police was consistent with a policy solely formulated and implemented by the Guardian Photo Lab Company. The lab company was not an agency of the Auburn Police Department.

Now, the one hundred and ninty [sic]-four photographs became the predicate for the search warrant secured by the Plymouth Police, and in examining the photos, the local police recognized the defendant as being in one or more of the pictures. He was seen holding or touching a nude, eighteen month old male child. This

child is the son of Robin Zarick and the stepson of Nickolai Zarick. At this point the police, the Plymouth Police did not know that this male child was the defendant's [p. 823] stepson. The police were further privy to several incident reports from the Waterbury Police Department. See Defendant's Exhibit 8-A to 8-D. These reports documented the defendant photographing children randomly from his car.

The issue at this juncture is whether the facts and the affidavit are sufficient to justify an independent determination by a neutral and detached judge that the necessary probable cause existed for the issuance of the warrant.

Probable cause to search exists if there is probable cause to believe that the particular items sought to be seized are connected with criminal activity or will assist in a particular apprehension or conviction; and two, there is probable cause to believe that the item sought to be seized will be found in the place to be searched. The reviewing court may consider only the information that was actually before the issuing judge at the time the warrant was signed.

This warrant has been examined on its [p. 824] four corners, including the application and the affidavits appurtenant thereto. In examining the warrant, the reviewing court must assume the truth of the allegations in the affidavit and may draw reasonable inferences arising therefrom. The warrant application, see paragraphs three and five of the affidavit, describe photos of nude and partially nude juvenile males and females posing in costumes and makeup in a wooded area near a pond and

waterfall. The photos were further described as showing the vaginas, breasts and penises of the juveniles, and some photos were described as depicting nude children caressing each other. The defendant, known to the police officer, was seen holding a nude child in one or more of the photos. Investigation disclosed that the Waterbury police department had recorded four complaints involving the defendant randomly photographing young children from his motor vehicle. The automobile alluded to in the reports was registered to the defendant.

The defendant argues that the signing judge, see testimony of Officer Luba, was [p. 825] shown the Guardian Photo Lab pictures before the warrant was issued. On direct examination it is my recollection Officer Luba testified that the one hundred and ninty [sic]-four Guardian Photo Lab pictures were shown to the magistrate at the time the warrant was signed. On cross-examination Officer Luba testified that he could not recall whether the Guardian Lab pictures were shown to the judge before or after the warrant was signed. This Court could conclude that the subject photographs were viewed by the signing judge after she signed the warrant. This would be consistent with the evidence before me and the presumption of validity which attaches to a determination of probable cause by judicial officers.

But even if arguendo the evidence was sufficient to conclude that the signing magistrate examined the pictures, either prior to or at the signing of the warrant, this Court can nevertheless find within the four corners of the subject warrant that the signing magistrate had a legally sufficient basis to find probable cause.

[p. 826] The allegations in the affidavit set out that the affiants were familiar with pedophilic activities, that they had substantial police experience in cases involving risk of injury to minors, that they had studied and examined an FBI manual on pedophiles, that they had identified the defendant from one or more of the Guardian Lab pictures, that they were aware of complaints in the Waterbury area concerning the defendant's snapping pictures of juveniles from his car and that they had examined the one hundred and ninty [sic]-four Guardian Lab photos, describing for the magistrate pictures which showed juvenile children posing frontally nude with makeup and partial costumes in a wooded and waterfall setting. The evidence researched and accumulated by the police affiants exceeded the requisite level of probable cause to warrant the issuance of the subject search and seizure warrant. This evidence was sufficiently set out in the warrant for the signing magistrate to reasonably conclude that probable cause existed.

[p. 827] There is no evidence that the photos, as argued by the defense, mitigated the probable cause set out in the warrant. The photos constituted evidence that felonious crimes had been committed upon the subject children. These photos were adequately described and articulated in the search warrant. The language employed in the warrant by the affiants reasonably mirrored and reflected the evidence turned over to them by Guardian Photo Lab. The request to seek additional photos, negatives, camera equipment, sexual aids and sexual juvenile literature was consistent and reasonable with their police background and experience. The photographs neither mitigated nor ameliorate the unequivocal articulation of

probable cause set out within the four corners of the subject warrant.

Notwithstanding the allegation in the defense brief that Judge Gill was involved in the preparation of the affidavit, there was no evidence from the testifying affiants to support these charges. In response to inquiry on pedophilic activity, Judge Gill tendered an FBI manual describing pedophilec traits and [p. 828] behavior to the affiant police officer. See Defendant's Exhibit 9.

There was unpersuasive evidence to support the charge that the magistrate was other than neutral and detached. No affidavits were presented to support these charges. The defendant's claim that the magistrate saw some pictures and therefore became biased and undetached is speculative. The sum of the affiant's testimony as regards Judge Dranginis is that they have no knowledge whether she saw the pictures before or after signing the warrant. Even if the signing had followed a preview of the pictures, the federal circuits have held that there is no Fourth Amendment violation when the issuing magistrate is presented with information in addition to that contained in the affidavit. The warrant is required to stand on its own pedestals. This Court has found that sufficient probable cause was set out in the application and affidavit to justify a signing by the magistrate.

Now, section 54-33a(c) of the Connecticut General Statutes declares that a warrant may [p. 829] issue only on affidavits sworn to by the complainants before the judge and establishing the grounds for issuing a warrant. In the case at bar, section 54-33a has been complied with. The warrant contains the affidavits sworn to by two

police officers and the affidavit sets out the grounds to support the existence of probable cause that the property to be seized had been or may be used as the means of comitting the criminal offense of risk of injury to a minor.

Now, the affidavit sets out allegations of experience with the behavior of pedophiles. The defense brief argues that one or more of the police officers testified to a paucity of experience in matters involving pedophiles, but even if arguendo this is correct, how would the signing judge have been made aware of any such limitations.

Defense counsel's argument that the magistrate is prohibited from viewing or taking any oral testimony at the time the warrant is signed, that the magistrate must find probable cause exclusively within the warrant itself, Judge Dranginis was, [p. 830] therefore, required to treat the allegations as true. She could and did rely upon the presumption of regularity. There was no evidence before her to question the allegations of police experience, nor was she permitted to accept any. The magistrate is required to accept the allegations in the warrant as truthful.

To the extent that the defendant is intimating a Franks violation, then the Court concludes that the evidence is lacking and that the appropriate procedures for alleging or proving false and reckless statements by the police officer have not been presented to this Court.

Now, Connecticut General Statute 54-33c requires that the warrant after execution shall be returned with reasonable promptness and shall be accompanied by a written inventory of all property seized. 54-33c requires

only that the application and all affidavits be filed with the clerk. All documents required to be filed with the clerk's office under 54-33c in this case were so returned. The one hundred and ninty-four [sic] [p. 831] photographs from Guardian Lab were not returned because they were not seized under either 54-33a or 54-33c. This Court additionally has ruled that these photographs were outside the exclusionary rule of the Fourth Amendment.

The essential function of 54-33c is to provide a mechanism of notice to the owner of items seized and an opportunity to be heard for their return. The marijuana seeds and marijuana plants constituted contraband. Testimony was presented that the defendant was given a receipt for the marijuana, and in any event, 54-33c did not contemplate an inventory for contraband because such contraband is not per se returnable to its rightful owner.

The evidence that the signing magistrate was neither neutral nor detached was either lacking or insufficient to rebut the presumption of validity.

The defense charges that the warrant was unconstitutionally generally and overbroad. The particularity clause of the Fourth Amendment requires that the items to be seized be described with sufficient particularity for [p. 832] police officers to locate and identify the same from the face of the warrant with reasonable certainty. Neither a technical nor completely accurate description is required. It is sufficient if the description is specific enough to eliminate any room for the exercise of discretion by the searcher. A description that is as specific as the circumstances and the nature of the activity under investigation permit is valid. The magistrate based on the

allegations in the affidavit and any reasonable inferences to be drawn therefrom could find probable cause that the particular evidence sought to be seized was connected with the crime of risk of injury to a minor or would assist in a particular apprehension or conviction for such a crime and could find probable cause that the evidence in question would be found in the area or place to be searched.

The subject warrant is clearly not an instrument authorizing the sweep of any and all items that may have have [sic] a relationship to the crime of risk of injury. The warrant is particular in its first aspect in listing [p. 833] twenty-one categories of items that are preceded by the modifying clause sexually explicit. A common sense reading of this authorization empowers the officers to seize only those described items that are sexually explicit in reference to the crime of risk of injury to a minor. Items seized that do not conform to this mandate are subject to suppression. The gathering by the police of an item or items beyond the parameters of the empowered seizure does not render the warrant nugatory, rather it subjects the improperly seized items to a suppression.

The evidence established that the officers were discrete in the execution of the warrant. They encountered a myriad of costumes, clothing, writing, photographs and sexual literature which they refused to seize. Their search and seizure conduct reflected police performance to remain within the confines of the warrant.

The nouns listed as modified by the opening sentence sexually explicit run from the first sentence starting with

the photographs to the fourth sentence ending with [p. 834] personal items.

The second aspect of the empowerment is the seizure of charts, records, computers, peripheral equipment, sexual aids, video and photographic equipment, pedophile manuals and photographic reproduction materials. These are sufficiently particularized so as to preclude the exercise of any general discretion upon the part of the executing officers. These are found listed in sentences five and six. Their listing results from the affiants' experience and knowledge of the methods and practices employed by pedophiles or child molesters. These are items rationally related to the modus operandi of pedophiles and child abusers. They are as much the tools of pedophiles as weighing scales, glassine bags and cutting knifes the tools of a drug dealer.

The third aspect of the empowerment addresses thirteen specific items found in sentences six through twelve. These items, with the exception of the defendant's 1981 Ford, were described from the one hundred and ninty-four [sic] photos turned over to the Auburn [p. 835] police by Guardian Photo Labs. In one or two instances the executing officer as to this last category acknowledged a partial mis-description of the item being sought. During the search when an item viewed in one or more of the Guardian Photo Lab photographs and recited in the warrant was seen, it was seized, but it is noted that the mis-description was de minimis and reflected more the absence of a scrivener's skill to replicate the object by its specific noun. Each item seized not accurately described in the third aspect of the warrant empowerment was nevertheless related to a photo involving the posing nude

children and was sufficiently described to alert the executing officer's attention to the item when he saw it.

The items particularized in the third aspect of the warrant, not accurately described, but sufficiently particular to preclude the exercise of a general search were as follows:

One, the warrant in its third aspect sought the seizure of a "black lace headband". [p. 836] The police seized a black lace shawl. Defendant's exhibit 19. Testimony by Officer Luba confirmed that the shawl seized is what he saw in the Auburn photos as a headband. Because it was used as a headband in the photo, he described it as such when he prepared his affidavit. Upon seizing it, he recognized it as the headband in the photographs, although in reality it was a shawl. For that reason, he listed it in the inventory as item number seven, a black lace shawl. At all times the police from their knowledge of the Auburn photos knew what they were searching for. When they saw the shawl, they recognized it as the headband in the photos. The inventory listed the item correctly as a shawl. Significantly, the description was correct as to color and content. It erred without harm as to its specific utility. Because the black lace shawl had been used as a black lace headband, it was thusly described in the warrant.

Two, the black bead necklace with tiger teeth, inventory item number 3, was described in the warrant as the black bead necklace with [p. 837] large white teeth. The mis-description, if at all, is de minimis from a generic description to a specific animal's teeth, but no one would seriously argue that tigers do not have large white teeth.

The officers in their search clearly understood what they were looking for as regards the necklace and the warrant description of large white teeth was sufficiently similar to tiger teeth so as to preclude a general search for this item.

Three, inventory item number four, two fur cuffs were described in the warrant as fur handwarmers. Similarly as in the example above, the description was based on how the police viewed their use by the posing children in the Guardian Lab pictures. The description was sufficiently accurate to guide the executing officers to the fur cuffs which avoided a general search.

Four, inventory items twenty-four and twenty-five, the fur collar and fur piece were described with less specificity in the warrant as "black and white animal fur skins" and "black fur". The discrepancy is again de minimis and did not deflect the officers from [p. 838] exercising a discrete search for such items.

The warrant empowered the seizure of sexually explicit photographs and negatives. Included in the film seized are sixty-one rolls of film voluntarily turned over to the police by Robin Zarick. The defendant argues that the development by the police of lawfully seized undeveloped film is constitutionally flawed. The law is otherwise. See State versus Petrone, 468 N.W. 2nd 76. The paramont constitutional issue is the legality of the film seizure, not development of legally seized film. Deflecting the issue at this juncture creates unnecessary confusion. The necessity for a second warrant to develop legally seized films would to this Court appear to be an exercise in furtility and not required by law.

The defendant argues in less than one-half page of an excellent twenty-five page brief that the seized materials enjoy the presumtive protection of the First Amendment. It is fundamental that the state's interest in protecting children from the dangers of sexual exploitation and abuse is unrelated to the [p. 839] suppression of free expression. In State versus Palangio, 24 Conn. App. 305, the appellate court held that "it rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute".

Now, in this regard Mr. Williams made available several days ago the case of Walter versus United States, 447 U.S. 649 which I had an opportunity to read over the weekend. Considering the issues which are of most concern to Mr. Williams, the case is an excellent case to advance his argument. It was written by Justice Stevens with a plurality of two. There were two justices in concurrence. Justice Marshall entered only as to the judgment and four, including Chief Justice Burger and now Chief Justice Renquist [sic], were in opposition. The distinctions are manifest and the Court wishes to take a few moments to point them out.

In the first paragraph of the decision, Justice Stevens citing to Stanley versus [p. 840] Georgia which was written by Justice Stewart illustrated in the Stanley versus Georgia case where agents with a warrant for wagering paraphernalia seized developed films and used the defendant's projector in his home to view the films and then thereafter arrested the defendant on obscenity charges. Justice Stewart went on, this is not a case where

agents in the course of a lawful search came upon contraband criminal activity or criminal evidence in plain view. The contents of the film could not be determined by mere inspection.

In Zarick the Guardian Photo Lab pictures were developed. It was in the words of Justice Stewart criminal evidence in plain view. In Walter the Supreme Court was dealing with a paramont 1st amendment issue. The FBI had to place film in a projector and run it. The Auburn police were confronted with the evidence of a crime as defined by State versus Palangio. In Walter, the plurality of two justices found a search without a warrant, the third party turning over developed film which the FBI ran on a [p. 841] projector. One reel was viewed by the FBI two months after the seizure. In Zarick we have a warrant requesting on the basis of probable cause the seizure of films, negatives, slides and photographs. The defendant is arguing that only the developed film transformed into pictures was seizeable. The warrant particularized negatives and slides. He was clear. It was clearly anticipated that all such negatives would be developed as was allowed in State versus Petrone.

Walter is inapplicable and non-supportive as relates to the issue of third parties, in this case Guardian Photo Lab turning over developed pictures of nude children to the police. The criminal act did not require the police to do anything further. It was self-evident.

Walter is not supportive and does not denigrate from State versus Petrone. In Walter the film reels were turned over to them by a third party. Although there were descriptions of the activities on the reels, the officers

were yet obliged to further intrude by viewing them. This the [sic] Court in [p. 842] Walter insisted required a warrant.

Now, in Petrone and Zarick the films were seized pursuant to a warrant. The first Amendment was not and is not an issue to these cases, citing here to State versus Palangio. The defendant contends that a second warrant is required to develop the pictures, deflecting the paramont issue involved. The Zarick warrant sought negatives, slide [sic] and photographs. Implicit in the use of negatives and slides are developed and undeveloped negatives, slides and films. The authorization to develop these negatives and film is implicit with the authority to seize them.

As to reasonable expectation of privacy, in Walter a private vendor was sending the film to a private buyer. The package in Walter was inexpectedly [sic] opened by a third party. In Zarick the defendant knew or should have known that the package would expectedly be opened, that any number of people would see the pictures both at Guardian Lab and Shop Rite stores. In Walter the package was opened by mistake. In Zarick the defendant planned [p. 843] for the package to be opened.

The dissent of four justices emphatically argues that the Fourth Amendment protections are related only as to governmental intrusion and that the Fourth Amendment does not apply where the intrusion results from the action of an innocent third party which was anticipated.

Palangio further concludes that "prior judicial decisions have specifically concluded that the photographing

of a nude or semi nude minor is a violation of section 53-21".

The defendant in objecting to the development of the sixty-one rolls of film turned over by Robin Zarick to the police relied upon Walter versus United States and stated in his brief that the 1980 United States Supreme Court was obviously not brought to Wisconsin Supreme Court's attention in 1991 when the State decided State versus Petrone, an issue analogous to the issue at hand.

The warrant in this case described the photographs, picture [sic], negatives and slides with as much particularity and specificity as the circumstances and the nature of the activity under investigation permitted. The [p. 844] Zarick warrant could not describe the type of film, the number of rolls or whether the film had been developed.

This warrant was specific enough to preclude a general search and in its first aspect it sought sexually explicit materials. In its second aspect a modifier is deemed not to apply to those specific items generally associated with pedophiles or child abusers. The third aspect sought to seize specific items associated with the posing nude childrens' photographs developed by Guardian Lab.

The execution of the warrant was done cautiously and discretely. Testimony established that many items, including photographs and costumes were left unseized because they did not fit the particularity requirement of the warrant or were unrelated to the one hundred and ninty-four photos which triggered the investigation culminating in the search warrant.

In this case the breadth of the warrant must be justified by the breadth of the probable cause, that only the improperly [p. 845] seized evidence, not all of the evidence must be suppressed unless there was a flagrant disregard for the terms of the warrant. That is a quote from U.S. versus Medlin 798 Fed. 2d 407, 10th circuit. The evidence established that the warrant was not a pretext for a general search, that the conduct of the executing officer was reasonable and proper, and accordingly only that evidence improperly seized is to be suppressed.

A magistrate's determination of probable cause should be accorded great deference by a reviewing court. In close cases, and this is not such a one, doubt should be resolved in favor of upholding searches conducted under the authority of the warrants.

I appreciate your patience. I'd like to run down the list of items that have been disputed that are listed in the inventory in part of this hearing.

Inventory item number seven, black lace shawl; for the reasons previously set out, the motion to suppress as to that item is denied.

Inventory item number fifteen, Annie's Little Girl Act, is a paperback book [p. 846] describing sexual encounters between adults who play the roles of children wearing children's clothes in order to enhance the partner's sexual excitement. Inexplicably the search warrant does not list sexually explicit paperback books or hardcover books. Annie's Little Girl Act is not encompassed within any of the three aspects of the warrant empowerment. Knowledge of pedophiles, the practices and

methods, their literature, read for their own sexual pleasure and to excite latent sexual emotions of children were readily within the contemplation of the police affiants. The warrant seeks sexually explicit magazines and sexually explicit sex education books. No reference is made to sexually explicit books or paperback books. This was easily anticipated as to subject matter and location by the police affiants. Because the plain view doctrine is inapplicable and not particularized as to any of the three aspects of the search warrant, the motion to suppress Annie's Little Girl Act is granted.

As to item number twenty-six, model releases, the evidence established that the [p. 847] police could not have reasonably anticipated a model release identified by Robin Zarick as her authority to take the photographs of the children developed by Guardian Photo Labs. The model releases are not suppressible because one, they come within the doctrine of plain view, and two, the evidence by a fair preponderance established that the model releases were consentually turned over by Robin Zarick to Office Derzewicki. Robin Zarick, this is my recollection, explained to Officer Derzewicki that she was performing "art work and that I didn't think I was doing anything wrong". In support of her contention, Robin Zarick located the model releases and voluntarily turned them over to Police Officer Derzewicki, further providing names of the several model juveniles.

Four, marijuana seeds and marijuana plants. During the execution of the warrant, police officers discovered marijuana seeds. These constituted contraband and further their seizure is justified by the plain view doctrine.

Upon being confronted by Sergeant Norton with the seeds, the defendant was [p. 848] advised that the police were leaving to secure a search warrant for marijuana plants. It is my recollection that the defendant voluntered, [sic] "do not waste your time, look up, the marijuana plants are up on the roof". The evidence by a fair preponderance established as to the marijuana seeds a permissible seizure based on plain view and constituting contraband. As to the plants, the seizure is permissible based on consent, plain view and constituting contraband. The motion to suppress is denied as to the marijuana seeds and the marijuana plants.

The sixty-one rolls of film which is inventory item number one, these are the sixty-one rolls of exposed film but not yet developed into picture form. These sixty-one rolls this Court finds admissible because they were consensually turned over by Robin Zarick to Officer Diana Derzewicki, and further because they fall within the first category of the warrant empowerment, that is sexually explicit photographs, negatives, photograph equipment, photographic reproduction materials and photographs. The evidence was [p. 849] uncontradicted and substantial that Robin Zarick in an effort to describe her activity as either legitimate or artistic provided voluntary statements, furnished model releases, displayed photographs and turned over rolls of undeveloped film to the police. The development of these exposed pictures is found not subject to exclusion under the Fourth Amendment. The Court cites States versus Petrone and the federal cases cited thereto that are part of Petrone.

Six, the black lace shawl, as recited in the body of the Court's main decision, the motion to suppress is denied.

Item number seven, I mean – excuse me. Inventory item number two, the black bathrobe with white embroidery on the right shoulder and back is specifically particularized in the warrant. The motion to suppress is denied.

The black bead necklace with tiger teeth was sufficiently particularized in the warrant as black bead necklace with large white teeth attached to it. For the reasons cited in the main body of the decision, this motion to suppress is denied.

[p. 850] Inventory item number four, two fur cuffs. They were described in the warrant as gold and white colored fur handwarmers. They were seized because the police had viewed them as the gold and white colored fur handwarmers in the Auburn photos. Testimony established as in the case of the black lace shawl and necklace with tiger teeth that the items seized were those items used by the posing children in the Guardian Lab photos, and one instance there was an inadvertent description of little significance and in another the items were described by the method in which they were used by the posing children. The motion to suppress is denied.

Inventory item five and six, one roll Kodacolar [sic] ASA 100 color film exposed and one U.S. flag are particularized sufficiently in the warrant to legitimize their seizure. The motion to suppress is denied.

Inventory item number eight is particularized in the warrant as billboard background with nude and partially clad children and adults. There was little dispute over this item. The motion to suppress is [p. 851] denied.

Inventory items number nine, ten, eleven, twelve, thirteen and fourteen are negatives and photographs, some of which are sexually explicit photos depicting nude or partially nude posing children. They were particularized in the first aspect of the empowerment paragraph of the warrant. Some of the photos depict background scenery and waterfall. To the extent these were seized to localize where the alleged crimes occurred, they are not subject to suppression. In the event of trial it is found the pictures are not relevant, they will be deemed inadmissible. That, however, is not the issue before me at this time. Some of the photographs depict children adequately closed so that genitalia is not exposed, nevertheless, some of the clothed children in these pictures have been photographed in sexually suggestive poses with pictures showing dresses pulled back to reveal thighs and other pictures focused on either the genitalia or breast areas. The remaining pictures of clothed children indicate that all [p. 852] of them proscribed or not were photographs in the same general neighborhood area. The seizure of these pictures of clothed children is justified under the warrant. In the alternative, they are seizable under the plain view doctrine, the clothed children not being the four children whose pictures were developed by Guardian Lab and whose presence given the circumstance of this case established an exigency that they were child victims. In any event, the discovery of these unknown children in posed pictures represents a sufficient enough exigency which required the police to seize them for identification and further investigation. Now, the issue of relevancy if it arises will be resolved at trial. For our purposes the

affidavit established that pedophile practice is to photograph young children posing or unaware, partially nude or clothed to fulfill pedophiles fantasies.

There were two or three pictures of a nude eighteen month old male child being held or attended to by the defendant. Evidence established that this was the defendant's [p. 853] stepson. This fact, although not necessarily exculpatory, was unknown to the police at the time of the seizure. Based on the information they possessed at the time the warrant was executed, the seizure of these pictures by the police was authorized. The motion as to these items to suppress is denied.

Inventory item number five I have addressed, Annie's Little Girl Act, the motion is granted.

Inventory item number sixteen, forty-one photos of the children, male and female in bathing trunks surrounding what appears to be a publically [sic] owned pool. These photograph [sic] are not particularized in any aspect of the empowerment clause of the warrant, no sexually explicit photographs, no sexual aids or charts or records and not specifically referred to in the third aspect of the warrant seizure clause, nor do they qualify as plain view because they are not evidence of a crime, not contraband, neither the fruits nor the tools of the crime, and finally because of the affiant's knowledge of pedophiles, pictures of partially dressed children or children in [p. 854] bathing trunks should have been particularized in the warrant. Finding these pictures could come as no surprise to the officer. They reasonably should have

anticipated their presence and included them in the seizure. The swimming pool pictures show no child in sexually suggestive poses, nor the background area essential for the protection of children placed at risk or required to localize the areas involving the four posing children in Guardian Photo Lab. The motion to suppress is granted as to that item.

Now, inventory item seventeen, two outlines on on [sic] formation of a klan. Both outlines I recall were in hardcover and were apparently in handwritten notes of the defendant. These come within the first aspect of the warrant empowerment authorizing the seizure of sexually explicit handwritten notes. Their relevance and admissibility is a matter to be adjudicated at trial and the motion is denied.

Inventory items fifteen, eighteen, ninteen, [sic] twenty, and twenty-one constitute a hundred and forty-five pictures, most of which [p. 855] depict posing nude or partially nude children. They are deemed authorized under the first aspect of the warrant.

Inventory item number twenty-two, one pair of black rubber handcuffs. The handcuffs were not involved in any of the Auburn photos, thus explaining their lack of mention in the warrant. The state's argument that the rubber handcuffs are sexual aides is not convincing. The contention of plain view is equally unconvincing. The rubber handcuffs are neither contraband, stolen property, fruits of a crime or tools of a crime. To accept the state's position is to engage in speculation or conjecture as to this particular item. The defendant's motion to suppress the black rubber handcuffs is granted.

Inventory item number twenty-three, leopard skin belt. This was clearly particularized in the third aspect of the warrant. The motion is denied.

Inventory item numbers twenty-four and twenty-five, one fur collar and one fur piece. the [sic] items particularized in the warrant are "black and white animal fur skin" and "black [p. 856] fur". These items were articulated from the Guardian Photo picture depicting nude and partially nude children posed in some type of fur skin, sometimes wrapped around their collar and sometimes wrapped around their arms. The descriptions, although not wholly accurate, were substantially sufficient to permit the executing officers to conduct a discrete search. When located the fur collar and fur piece were acknowledged as the animal fur skin and black fur particularized in the warrant. The motion is denied as to those two items. I think that covers everything.

This Court will grant an exception as to those motions that were suppressed to the State, and will grant an exception to the defense for those motions that were not suppressed.

I have two motions to dismiss dated December 27.

You were both very patient and I thank you. I hope I wasn't too fast. It was almost the length of a charge. I regret it, but your briefs were of a premier academic level, both of them, and I enjoyed reading them and [p. 857] although I found substantial or sufficient distinctions with Walter considering the issue at hand for you to cope with, Mr. Williams, it was an excellent case to present to the Court.

Why don't I take a fifteen minute break, give me a chance to look at this and in the event Mr. William wants to argue them or you need some time, Mr. Massameno, I will do whatever, either, whatever request of me, and then maybe the two of you if you need further time to make a determination as to what your time schedule is or what the agenda for this case is likely to be, assuming we start on Thursday. Mr. Williams has a matter tomorrow.

MR. WILLIAMS: Yes, I do, your Honor.

THE COURT: And I don't think he'd have any objection and you wouldn't have any objection. If we have to start on this case, we'll start on Thursday morning with a panel and give the rest – have the rest of the day off. Let me take a short recess, but I'll be available to anyone that wants me.

(Whereupon the case was adjourned.)

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## APPENDIX B-2

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| NO. 53954 | : | SUPERIOR COURT |
| STATE OF CONNECTICUT | : | J.D. HARTFORD/ NEW BRITAIN |
| VS. | : | AT HARTFORD |
| NIKOLAI A. ZARICK | : | SEPTEMBER 25, 1991 |
| | : | |

MOTION TO SUPPRESS

The defendant moves to Suppress any and all notes, film, negatives, photographic prints and any and all other direct and/or indirect evidence of a search and seizure conducted by officers of the Auburn, Massachusetts, Police Department within Auburn, Massachusetts, on and before August 22, 1987, and in support of this motion represents as follows:

1. On or before August 22, 1987, within Auburn, Massachusetts, Detective Seargeant [sic] Thomas Mancusco and/or other officers of the said Police Department seized a quantity of film, negatives, photographic prints and other evidence belonging to the defendant.

2. The said seizure was conducted without a warrant.

3. The said seizure was conducted without probable cause.

4. No exigent circumstances existed to justify or excuse the failure to obtain a warrant prior to making the said seizure.

5. On August 22, 1987, the said evidence was turned over to officers of the Plymouth, Connecticut, Police

Department, including, but not limited to, Officer Luba of the said Department, by the said Detective Sergeant Mancusco and thereafter was utilized by the said Connecticut officials to further the prosecution of the defendant.

6. All of the said evidence, and other evidence obtained as a direct result of the utilization of the said evidence, is proposed to be used by the State as evidence in this case.

7. The searches and seizures described above, and the utilization of the fruits thereof, violates the defendant's rights to be free from warrantless search and seizure, unreasonable search and seizure, search and seizure without probable cause, and due process of law, all of which rights are secured to the defendant by the provisions of the Fourth and Fourteenth Amendments to the United States Constitution, Article I, Sections 7 and 8 of the Connecticut Constitution, and Section 54-33f of the Connecticut General Statutes.

8. The facts providing the basis for this motion were disclosed to the defendant by the State on September 23, 1991.

THE DEFENDANT

BY _____
JOHN R. WILLIAMS
His Attorney

## APPENDIX C

* * *

The Auburn Police Department had an official policy of joint action for policing the morals of photographers who utilized the Guardian service." Def. Brief at 26. This statement is so contrary to facts established that one cannot help but wonder just which record the defendant has reviewed. *See* footnote 9, *supra.* Regarding Guardian's alleged agency, the trial court's ruling speaks for itself:

> Now, the policy to turn over questionable photographs to the Auburn Police Department was a policy initiated and maintained by the Guardian Photo Labs. *See* Exhibit A. Although the policy was approved by the Auburn Police Department, the evidence established that Guardian Photo Lab had a nationwide policy amongst its photo lab branches to turn over to local police pictures they deem to be questionable. Photographs of posing nude children come within this orbit of questionability. The suggestion that Guardian Photo Lab was an agency of the Auburn Police Department is a suggestion neither warranted nor supported by the evidence. Guardian Photo Lab initiated and promulgated a policy which it implemented by turning over to local police questionable photos. The decision to turn over pictures rested exclusively with the private laboratory. No one from the Auburn Police Department either supervised or randomly checked the development process of Guardian Lab. No instructions, rules or regulations or policy was directed from the Auburn police to Guardian Lab. The evidence unequivocally established that the practice of turning over questionable photos to the local

> police was consistent with a policy solely formulated and implemented by the Guardian Photo Lab Company. The lab company was not an agency of the Auburn Police Department.

T. 13/3/91 at 821-22. The court's factual finding that Guardian was not a state agent is not clearly erroneous and must stand. *See* T. 11/13/91 at 604, 614, 622-23, 650 (Testimony of Thomas Mancuso).

There is no seizure within the meaning of the Fourth Amendment when an object in private possession is voluntarily relinquished to the government. *See Coolidge v. New Hampshire,* 403 U.S. 443, 488-89 (1971) (Fourth Amendment not implicated when articles discovered in private search voluntarily turned over to the

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## APPENDIX D-1

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1991. This Information, filed under the docket number which eventually became this appeal, consolidated everything from both cases. R. pp. 1-49, 60-68, 70-76; App. pp. 47-95.

A consolidated hearing on all motions to dismiss and suppress began before Judge Spada on September 25, 1991 and concluded on December 5, 1991. Although the Court made few if any express factual findings, the facts on which the Court based its decision are for the most part not in dispute.

On August 22, 1987, Officer Paul Beals of the Plymouth, Connecticut, Police Department received a telephone call from Detective Sergeant Thomas Mancuso of the Auburn, Massachusetts Police Department. Sergeant Mancuso explained that located in Auburn was a photo-processing plan named Guardian Photo Lab which processed photograph film received from a wide geographical area. There was a formal relationship between the Auburn Police Department and the Guardian Photo Lab by the terms of which the Guardian Photo Lab would turn over to the Auburn Police Department for review any photographs developed by the lab which seemed to them to be of a "questionable" nature. If the Auburn Police also believed the photographs were "questionable" they would contact the police department in the locality from which the film had been sent and then would forward copies of those photographs to the local police department. This policy had been adopted as an official policy of the Auburn Police Department.

10/15/91 Tr. pp. 9, *et seq.*; 11/21/91 Tr. pp. 604-05; App. pp. 43-46.

Following that procedure, Guardian Photo Lab had turned over to Sergeant Mancuso 194 photographs which had been received from Mr. and Mrs. Nikolai Zarick, residents of Plymouth. Sergeant Mancuso had no objective standards to govern his decisions in cases like this. He had carried out such procedures on at least four occasions that he can remember and always was governed simply by his own subjective opinion. His concern was whether the pictures were "obscene" and did not in any way involve any considerations of the welfare of children. 11/21/91 Tr. pp. 606-20.

Officer Beals dispatched Officer Michael Luba of the Plymouth Police Department to meet Sergeant Mancuso at a rest stop on Interstate Highway 84 in Manchester, Connecticut. There, Sergeant Mancuso turned over the 194 photographs to Officer Luba. Those photographs were received in evidence at the suppression hearing and are reprinted in the sealed Appendix to the Defendant's Brief herein at pages 96 through 193. 10/15/91 Tr. pp. 14-27, 79-86; App. pp. 96-193. Officers Beals and Luba agree that none of these photographs shows either actual or simulated sexual intercourse, none portrays sex with animals, none portrays masturbation and none portrays any sort of sadomasochistic abuse. 10/15/91 Tr. pp. 64-65; 10/16/91 Tr. pp. 16-17.

Called upon repeatedly to disclose everything he did in the course of investigating this case, Officer Beals testified only that a brief corroborating investigation was

conducted and a search warrant application was prepared based upon the 194 photographs, but that he did not personally participate in executing that

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**APPENDIX D-2**

**POLICE DEPARTMENT**

ROBERT F. JOHNSON – Chief of Police

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Auburn, Massachusetts 01501 Telephone 832-3231

August 31, 1987

Plymouth Police Department
19 East Main Street
P.O. Box 34
Cherryville, CT. 06786

Attention: Officer Beals

Officer Beals,

Please be advised that per Richard Arlett, Plant Manager, it has been common practice in the past, for Guardian Photo to submit copies of original photographs of children to the Auburn Police Department, to which, in their estimation, are of a questionable nature. If after examination of the photographs, I feel there is sufficient cause for further investigation, the Department who has jurisdiction over the city or town where the pictures are delivered to and/or the locality where the subject having the pictures developed resides, is then notified. It is the assumption of the Auburn Police Department that the original photographs and the negatives are returned to the owner in the usual manner.

If I can be of further assistance, please do not hesitate to contact me.

Respectfully,
/s/ Thomas A. Mancuso
Thomas A. Mancuso
Det. Sergeant

Tam/cg
Enc: Guardian Photo
Policy & Procedures

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